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CITATIONS

655527—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 183

A. P. GIANNINI, ADMINISTRATOR OF THE ESTATE OF VIRGIL D. GIANNINI, DECEASED, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 32–44) is reported at 2 T. C. 1160. The opinion of the Circuit Court of Appeals (R. 99–104) is reported at 148 F. 2d 285.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 9, 1945 (R. 104–105), and a petition for rehearing was denied on April 9, 1945 (R. 105). The petition for a writ of certiorari was filed on June 27, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Decedent, his brother and sister, and their parents transferred property to a family trust. The decedent and his brother and sister were made beneficiaries of the trust and no interest was retained by the parents. The question is whether the value of the transfer to the trust by decedent is includible in his gross estate under Section 302 (c) of the Revenue Act of 1926, as amended, or whether the transfer was made for a consideration in money or money's worth and is therefore exempt from inclusion under either Section 302 (c) or Section 302 (i) of the Revenue Act of 1926, as amended.

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302 [as amended by the Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 803]. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
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> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he

has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

* * * * *

(i) If any one of the transfers, trusts, interests, rights, or powers, enumerated and described in subdivisions (c), (d), and (f) of this section is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the value of the consideration received therefor by the decedent.

STATEMENT

In 1935, decedent, his brother and sister and their parents conveyed certain property to the Bank of America National Trust and Savings Association, as trustee, in execution of an irrevocable trust (R. 35, 62–85). The property so con-

veyed had formerly been held by the A. P. Giannini Company, a family corporation whose stock was solely owned by the grantors of the trust here involved (R. 34). Upon dissolution of that company, decedent's parents, desiring to make permanent provision for their children and believing that the property would be of greater value if kept together, suggested that if the children would convey their property to a trust they would do likewise and would retain no interest in the trust (R. 34–35).

Decedent and his brother and sister were named beneficiaries of the trust (R. 35–36, 73). No interest was retained by the parents (R. 82). Under the terms of the trust instrument the net income of the trust was to be paid in equal shares to the beneficiaries, or, if any were deceased, to their nominee or nominees (R. 73–74). Each beneficiary possessed the right to nominate by will his natural child or children to succeed to his interest in the trust upon his death, and if no nominee was appointed the beneficiary's interest was to augment the respective shares of the remaining beneficiaries (R. 74–75). The beneficiaries signed the following statement on the trust instrument (R. 85): "The undersigned, being beneficiaries named in the foregoing Trust Agreement, hereby accept the gifts therein declared."

The property conveyed to the trust had an aggregate net value of $457,039.96. Decedent and

his brother and sister each contributed $43,248.62, or 9.25 percent of this amount, and the parents contributed the remainder (R. 35). The net income from the trust averaged more than nine percent per year, and the fair value of the right of decedent to receive one-third of the income from the trust for life was found to be substantially in excess of his contribution (R. 39).

On April 28, 1938, decedent died without issue (R. 33–34), his interest in the trust then passing to his brother and sister (R. 37). In the estate tax return filed by petitioner, the property which decedent had transferred to the family trust was not reported (R. 21). The Commissioner of Internal Revenue held that this transfer was includible in the gross estate under Section 302 (c) of the Revenue Act of 1926, as amended, and determined a deficiency in decedent's gross estate of $46,072.04, an amount representing 9.25 percent of the net value of the trust on its basic valuation date (R. 22, 39). The Tax Court sustained the Commissioner's determination (R. 40–44) and the Circuit Court of Appeals upheld the Tax Court (R. 99–104).

ARGUMENT

Since the decedent retained the right to receive income for life from the property which he transferred to the trust, and since his interest in the property passed to his brother and sister upon his death, the value of the property is includible in

his gross estate under Section 302 (c) of the Revenue Act of 1926, as amended, *supra*, pp. 2–3. That Section provides, however, that transfers which constitute a "bona fide sale for an adequate and full consideration in money or money's worth" shall not be includible in the gross estate. And if the transfer is not "a bona fide sale for an adequate and full consideration in money or money's worth" but is "for a consideration in money or money's worth," only the excess of the value of the property over the consideration received is includible in the gross estate under Section 302 (i) of the Revenue Act of 1926, as amended, *supra*, p. 3. The courts below properly held that the transfer made by the decedent to the trust was not exempt from taxation under either of these exclusion provisions.

Inasmuch as decedent's parents contributed the bulk of the trust property and retained no interest in it, decedent acquired a financial interest in the family trust greater than the value of the property he transferred. It does not follow, however, that the parents' contribution constituted "consideration in money or money's worth" for decedent's transfer within the meaning of the statute. On the contrary, the facts clearly demonstrate that the transfer by decedent's parents to the trust was a gift, and not consideration for the decedent's transfer. The family nature of the settlement, the parental desire to provide for their

children, the absence of any evidence as to bargaining, and decedent's express acceptance of the trust as a gift are consonant only with this view. The Tax Court stated that it had "searched the record in vain for any indication of a quid pro quo" (R. 42), and the Circuit Court of Appeals concluded that the facts did not show any "consideration in money or money's worth for the decedent's transfer of property to the trust" (R. 102). This finding as to the nature of the transaction, being supported by the evidence, is conclusive. Cf. *Choate* v. *Commissioner,* 324 U. S. 1.

Moreover, the court below held that the transfer by decedent's parents was a gift within the meaning of the gift tax law, Section 503 of the Revenue Act of 1932, c. 209, 47 Stat. 169. Since the parents' transfers were not supported by consideration in "money or money's worth," this holding was correct under the recent decisions of this Court in *Commissioner* v. *Wemyss,* 324 U. S. 303, and *Merrill* v. *Fahs,* 324 U. S. 308. This is an additional ground buttressing the conclusion that the parents' transfers did not constitute "consideration" for decedent's transfer for estate tax purposes.

Inclusion of the decedent's transfer in his gross estate is entirely consistent with the policy of the estate tax. In establishing a requirement of "consideration in money or money's worth," Congress had in mind the exclusion of "family contracts

and similar undertakings made as a cloak to cover gifts." *Carney* v. *Benz,* 90 F. 2d 747, 749 (C. C. A. 1st). The instant facts clearly savor of a family settlement rather than the arms-length bargaining contemplated by the statute to relieve a decedent's estate of taxation. Cf. *Robinette* v. *Helvering,* 318 U. S. 184. As stated by the Circuit Court of Appeals, the value of the interest received by decedent as a result of the transfer came "not from bargaining but from the largess of the parents in donating a substantial sum for their children's financial security" (R. 102). Finally, it would defeat the purpose of the statute if decedent's transfer were exempted from the estate tax by treating as consideration the alleged *quid pro quo* received when none of it could by any possibility become a part of the decedent's estate. (See 26 U. S. C. 811 (f).)

There is no conflict with *Helvering* v. *Safe Deposit & Trust Co. of Baltimore,* 95 F. 2d 806 (C. C. A. 4th), and *Taft* v. *Commissioner,* 92 F. 2d 667 (C. C. A. 6th) (Pet. 15) involving the question whether pledges made by a decedent to charitable or educational institutions in consideration of similar pledges by others were deductible claims against the estate within the scope of Section 303 (a) (1) of the Revenue Act of 1926. Those cases merely held that since the consideration involved was reducible to money or money's worth, such consideration need not benefit the decedent

to constitute "adequate and full consideration in money or money's worth" within the meaning of that Section.[1] The issue presented in the instant case involving a different provision and different legislative purpose, is patently distinguishable.

CONCLUSION

The decision below is correct and there is no conflict. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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JULY 1945.

[1] Such a holding may be open to question in view of this Court's construction of the statute in *Taft* v. *Commissioner*, 304 U. S. 351, holding non-deductible independent pledges to charitable and educational institutions which were legally enforceable against the decedent's estate. See also *Commissioner* v. *Wemyss*, 324 U. S. 303. Moreover, the courts in both cases cited by petitioner were no doubt influenced by the fact that an actual bequest to the charitable institutions would have been deductible under Section 303 (a) (3) of the Revenue Act of 1926; and it may be noted that Congress has now amended the statute in order to permit a deduction in the case of all enforceable pledges to such institutions which would be deductible if they were bequests. See Section 406 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, amending Section 812 (b) of the Internal Revenue Code.

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